

PNSB ACMAR SDN BHD v. PALANISAMY KUPPUSAMY

HIGH COURT MALAYA, SHAH ALAM

CHAN JIT LI JC

[CIVIL SUIT NO: 22-316-2003]

15 MAY 2017

CIVIL PROCEDURE: *Appeal – Assessment of damages – Appeal against decision of Registrar – Claim for damages arising from defects in building structure – Registrar granted nominal damages despite finding purchaser failed to prove damages – Whether Registrar erred in concluding that purchaser failed to prove damages – Whether order of nominal damages justified*

The plaintiff executed a sale and purchase agreement ('SPA') to purchase from the defendant, the developer of a housing scheme for a double storey house ('bungalow') for a sum of RM568,000. After taking vacant possession of the bungalow, the plaintiff complained of defects in the structure, alleging that as a result of the defects, he suffered loss mainly in remedial works. The plaintiff sued the defendant for damages. At the end of the hearing, the trial judge entered judgment in the plaintiff's favour. The assessment of damages took place before the Registrar. The Registrar found that the plaintiff failed to prove his claim for damages but, nevertheless, went on to order the defendant to pay the plaintiff 'nominal' damages of an extraordinary sum of RM800,000. The plaintiff did not file any appeal despite the Registrar's findings that he had failed to prove the damages he purportedly suffered. The defendant, however, appealed to the judge-in-chambers ('JIC') contending that the Registrar erred in awarding a sum of RM800,000 as nominal damages. The JIC allowed the appeal and reduced the award of RM800,000 to RM10,000 ('the said order'). The plaintiff then appealed against the said order. The Court of Appeal ordered that the appeal be remitted to the High Court for a re-hearing. Hence, the present appeal. The issues that arose for determination, *inter alia*, was whether the present court was within its powers to consider whether or not the Registrar erred in concluding that the plaintiff failed to prove his claim for damages.

Held (ordering re-assessment of damages):

- (1) A judge hearing an appeal to a JIC from a decision of the Registrar is, as a matter of law, rehearing the application and is entitled to treat the matter as though it comes before him for the first time; and that he is not fettered by any previous finding, ruling or order of the Registrar's from whose decision the appeal originates. Therefore, it is within the present court's powers to consider the issue of whether the Registrar was right in concluding that the plaintiff failed to discharge his burden of proving his claim for damages even though the plaintiff failed to file an appeal. (para 19)

- A (2) The decision of the Registrar was inherently flawed. An award is intrinsically intertwined with the damage suffered. If the Registrar's finding was that the plaintiff failed to prove the damage he suffered, it followed that the Registrar had no basis to make an award of RM800,000. (para 20)
- B (3) Under the SPA, the plaintiff had only paid a sum of RM568,000 for both the building and the land on which the bungalow was built. Assuming that the building was found to be wholly unfit for dwelling, the award of RM800,000 enriched the plaintiff by RM232,000 plus the value of the said land. *Prima facie* this cannot be right. Therefore, in the interests of justice, a reassessment of the damages was ordered. (paras 21 & 22)
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Case(s) referred to:

John Andrew Malthouse v. Cyril Steven & Ors [2014] 8 CLJ 461 HC (*dist*)
Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 SC (*refd*)

D *Tuan Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241 FC (*refd*)
Yong Teng Hing v. Walton International Ltd; Pendaftar Cap Dagang, Malaysia (Interested Party) [2011] 7 CLJ 401 FC (*refd*)

For the plaintiff - Ravindran Neeko; M/s Hakem Arabi & Assocs

- E *For the defendant - Kanarasan Ghandinesen; M/s Gandhi*

Reported by Sandra Gabriel

JUDGMENT

- F **Chan Jit Li JC:**

[1] This is an appeal against the order of the Registrar awarding the plaintiff damages. As this case had been subjected to more than one appeal from both parties, for convenience the parties will be referred to as 'the plaintiff' and 'the defendant'.

- G [2] The factual background leading to the appeal before me is as follows. The defendant was the developer of a housing scheme advertised as 'Bandar Baru Klang, the 21st Century Township'. On 14 November 1994, the plaintiff executed a sale and purchase agreement ('SPA') to purchase from the defendant a double storey house ('bungalow') to be erected on a piece of land identified as Lot No. P.T. No. 21192 H.S (M) for a sum of RM568,000.
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[3] There is no dispute that the plaintiff did pay up the whole sum and the defendant did deliver vacant possession of the bungalow.

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[4] After taking possession, the plaintiff complained of defects in the structure alleging that as a result of the defects, he suffered loss chiefly in remedial works. He sued the defendant for damages and at the end of the hearing, the learned trial judge entered judgment in his favour granting the following prayers in para. 29 of the statement of claim:

- (1)
- (2) Gantirugi am untuk ditaksirkan;
- (3) Faedah gantirugi am yang ditetapkan pada kadar 8% setahun bermula dari tarikh penghakiman sehingga ke tarikh penyelesaian penuh;
- (4) Kos.
- (5) ...

[5] The assessment of damages took place before the learned Registrar. The plaintiff called three witnesses comprising of the plaintiff himself, an engineer and a quantity surveyor, whilst the defendant called its Assistant General Manager of the Regulatory Affairs Unit. Although there is no written grounds from the learned Registrar, it is common grounds between both parties that at the end of the assessment hearing, the learned Registrar arrived at the following finding. She found that the plaintiff failed to prove his claim for damages but, nevertheless, went on to order the defendant to pay the plaintiff 'nominal' damages of an extraordinary sum of RM800,000.

[6] The plaintiff did not file any appeal despite the Registrar's findings that he had failed to prove the damages he purportedly suffered. His omission is understandable as regardless of the findings, he was awarded the generous sum of RM800,000 for just 'nominal' damages.

[7] The defendant, on the other hand, filed an appeal to the judge in chambers contending that the learned Registrar erred in awarding a sum of RM800,000 as nominal damages.

[8] After the hearing, the learned judge allowed the appeal and reduced the award of RM800,000 to a mere RM10,000. (The parties, however, did not furnish me with a copy of the grounds of this judgment.)

[9] The plaintiff was naturally unhappy and appealed against the order of the appeal judge. After hearing the parties, the Court of Appeal ordered that the appeal be remitted to the High Court for a rehearing. Hence, the present appeal before me.

[10] Before me, Mr Ravindran a/l Neeko @ Veloo ('Mr Ravindran'), the learned counsel for the defendant, submits that since the plaintiff did not file an appeal against the decision of the Registrar, therefore, he is bound by the whole of the decision of the Registrar. He further submits that there is only

- A one appeal before this court and that is the defendant's appeal. This appeal, however, is not against the whole of the Registrar's decision but only in part. He goes further by crystallising the issue as follows: whether nominal damages can be set at RM800,000? He contends that as that is the sole issue in this appeal and as it is a legal issue, this court is estopped from evaluating the evidence that had been adduced at the assessment before the Registrar.
- B Apart from that, the court is also estopped from considering any other issues. He cites *John Andrew Malthouse v. Cyril Steven & Ors* [2014] 8 CLJ 461; [2015] 7 MLJ 548 in support of his contention.

- C [11] Mr Kanarasan Ghandinesen, learned counsel for the plaintiff, concedes that the learned Registrar erred in awarding RM800,000 as nominal damages. However, it is his submission that the hearing of this appeal should not be confined only to the issue of what constitutes nominal damages. In this appeal, the court should also consider whether or not the learned Registrar erred in concluding that the plaintiff had failed to prove his claim for damages. Mr Kanarasan contends that it was for this very reason that the Court of Appeal directed a rehearing of the appeal as the earlier judge did not do so.
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[12] There is no written ground from the Court of Appeal for the judgment which appears as follows:

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- DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN SIVIL)
RAYUAN SIVIL NO: B-02(IM)-2566-11/2013
ANTARA
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| PALANISAMY A/L KUPPUSAMY
(NO. KP: 541113-10-5151) | PERAYU/
PLAINTIFF |
|--|----------------------|
- DAN
- G
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|---|------------------------|
| PNSB ACMAR SDN BHD
(No. Syarikat : 246708-M) | RESPONDEN/
DEFENDAN |
|---|------------------------|
- (Dalam Perkara Mengenai Guaman Sivil No. 22-316-2003 dalam Mahkamah Tinggi Malaysia di Shah Alam)
- ANTARA
- H
- | | |
|---|---------------------|
| PNSB ACMAR SDN BHD
(No. Syarikat : 246708-M) | Perayu/
Defendan |
|---|---------------------|
- DAN
- | | |
|--|------------------------|
| PALANISAMY A/L KUPPUSAMY
(NO. KP: 541113-10-5151) | Responden/
Plaintif |
|--|------------------------|
- I

KORAM

MOHAMAD ARIFF BIN MD YUSOF, HMR

MOHD ZAWAWI BIN SALLEH, HMR

IDRUS BIN HARUN, HMR

A

PADA 29 SEPTEMBER 2014 DALAM MAHKAMAH TERBUKA

PERINTAH

B

RAYUAN INI ditetapkan untuk pendengaran pada hari ini dalam kehadiran Kanarasan Ghandinesen peguam bagi pihak Perayu dan Ravi Nekoo (R. Hanita) bersama peguam bagi pihak Responden DAN SETELAH MEMBACA Rekod Rayuan dan kesemuanya yang difailkan di sini DAN SETELAH MENDENGAR hujahan pihak-pihak yang hadir MAKA ADALAH DENGAN INI DIPERINTAHKAN bahawa:

C

(a) Rayuan dibenarkan sebahagian di mana tindakan ini diremit ke Mahkamah Tinggi untuk di dengar semula berdasarkan merit sepenuhnya rayuan taksiran ganti rugi dari keputusan Penolong Kanan Pendaftar bertarikh 14.03.2013.

D

(b) Kos dalam kausa; dan

(c) Deposit dikembalikan kepada Perayu.

DIBERI di bawah tandatangan saya dan Meterai Mahkamah pada 29 September 2014.

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...

TIMBALAN PENDAFTAR
MAHKAMAH RAYUAN MALAYSIA
PUTRAJAYA

F

(emphasis added.)

[13] The direction of the Court of Appeal is clear and unequivocal. In the rehearing the High Court is required to consider all the merits arising in the appeal. Only this interpretation can give efficacy to the judgment of the Court of Appeal. If the judgment was interpreted otherwise, that is to say, as what Mr Ravindran submits, it would mean a re-litigation of the same issue as his argument contained in paragraph above had been dealt with by the earlier judge.

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[14] I am, therefore, of the view that Mr Kanarasan's submission as to the conduct of this rehearing is correct.

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[15] In *John Andrew*, the authority relied by Mr Ravindran, the High Court sat to hear an appeal against the Registrar's award of damages in an accident claim. Among other issues in the appeal was the award of RM500,000 for pain and suffering. The appellant-defendant had submitted that the learned Registrar erred in making the award based on 2011 precedents. He had contended that the learned Registrar should have considered precedents from

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A the date of service of the writ to the date of judgment (8 March 2001). The respondent-plaintiff had then sought an increased award RM1.2 mil. The learned judge had then ruled that the court should be concerned with matters which are not the subject of appeal.

B [16] The facts in *John Andrew* can be distinguished. Although the issues raised related to the same item of claim ie, pain and suffering, the issues taken up by the parties were distinct and separate. The subject matter raised by both parties in the instant appeal, although against that very one order of the learned Registrar, are intertwined and interdependent. The circumstances necessitate the consideration of both issues (which I shall deal with in para. 20).

C [17] It is trite law the hearing of an appeal from the subordinate courts is distinct from the hearing of an appeal against the order of a Registrar. (See *Yong Teng Hing v. Walton International Ltd; Pendaftar Cap Dagang, Malaysia (Interested Party)* [2011] 7 CLJ 401; [2011] 5 MLJ 629). In *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241, Edgar Joseph Jr FCJ (as he then was) delivering the judgment of the Federal Court held (at p. 241) that:

E With respect, in appeals to a Judge in chambers from the decision of a Registrar of the High Court, the Judge is not exercising appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the Subordinate Courts. Such appeals from decisions of the Registrar are by way of an actual re-hearing and the Judge treats the matter as though it comes before him for the first time. **The Judge is therefore not confined to the points taken before the Registrar so that the rule about new points being not generally open to an Appellant to take on appeal does not apply.**

F In support, we would refer to the following passage in the judgment of Payne J in *Blundell v. Rimmer* [1971] 1 All ER 1072 (1076):

G I understand that the arguments before me ranged over a wider ground than those advanced by the parties' solicitors to the district registrar, and it was contended by Counsel for the plaintiff that I was fettered by the proceedings before the district registrar and confined to the arguments which were presented to him; that no point could be raised before me which was not raised below.

H It is, I think, clear on authority that the appeal from the district registrar is a rehearing of the application and I am entitled to treat the matter as though it comes before me for the first time; moreover, that I am not fettered by the previous exercise of the district registrar's discretion, although I should, of course, give to it the weight which it deserves.

I (emphasis added)

[18] In *Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716 Edgar Joseph Jr SCJ (as he then was) in delivering the judgment of the Supreme Court held (at p. 724):

The second point we should like to make is that the Judge did mention, in passing, - in our view quite correctly - that though the matter before him was in form an appeal, it did “take the shape and style of rehearing ...”. However, in his approach to the questions for decision, he treated the appeal, in the fullest sense, as an appeal from a discretionary order made by the Registrar. In other words, it looks very much as though the Judge’s approach was that he should not interfere with the Registrar’s exercise of discretion unless it was shown that the discretion had been exercised on a wrong principle or not at all, or that there had been a miscarriage of justice. In other words, as an appellate Judge, he was not to exercise an independent discretion of his own, but had to defer to the Registrar’s exercise of his discretion and could not interfere with it merely on the ground that he would have exercised it differently. (See 37 *Halsbury’s Laws*, 4th Edn., p. 493 para 656). In adopting this approach, the Judge was wrong, the appeal before him being from the Registrar by way of an actual re-hearing.

[19] The above judgments fortify my view that a judge hearing an appeal to a judge-in-chambers from a decision of the Registrar is as a matter of law rehearing the application and is entitled to treat the matter as though it comes before him for the first time; and that he is not fettered by any previous finding, ruling or order of the Registrar’s from whose decision the appeal originates. Therefore, in the context of the matter that is now before me, I hold that it is within my powers to consider the issue of whether the learned Registrar was right in concluding that the plaintiff had failed to discharge his burden of proving his claim for damages even though the plaintiff failed to file an appeal.

[20] With respect, I find the decision of the learned Registrar to be inherently flawed. An award is intrinsically intertwined with the damage suffered. If her finding was that the plaintiff had failed to prove the damage he suffered, it follows that she had no basis to make an award of RM800,000.

[21] I also noted that under the SPA the plaintiff had only paid a sum of RM568,000. The RM568,000 was for both the building and the land on which the bungalow was built. Working on the assumption that the building was found to be wholly unfit for dwelling, this award of RM800,000 enriched the plaintiff by RM232,000 plus the value of the said land which I presume had been transferred to him. *Prima facie* this cannot be right. However, there is no evidence to allow me to make a variation of the quantum even if I were minded to. There is also the issue of the costs of reconstruction of RM1,506,500 which is far in excess of the contract price. Was the plaintiff substituting a better grade of raw materials in the reconstruction of the building? Or was the higher costs simply because of inflation?

A [22] I find that these issues, amongst others, were not addressed evidentially and this deprives me making a considered decision. Thus in the interests of justice, I directed that there be a reassessment of the damages to be conducted before me.

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